IN THE

United States Court of Appeals

For the Ninth Circuit.

Civil Action—No. 15714.

TALON, INC.,

Appellant,

v.

UNION SLIDE FASTENER, INC.,

Appellee.

UNION SLIDE FASTENER, INC.,

Appellant,

v.

TALON, INC.,

Appellee.

BRIEF ON BEHALF OF APPELLANT UNION SLIDE FASTENER, INC.

ALAN D. MOCKABEE,
Attorney for Appellant, Union Slide Fastener, Inc.,
108 West 6th Street,
Los Angeles, Cal.

DELAVAN SMITH,
EDWIN S. SHAPIRO,
SMITH & AUSLANDER,
160 Broadway,
New York 6, N. Y.,

WILLIAM J. GRAHAM,
12 E. 41st Street,
New York 17, N. Y.,
Of Counsel.

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Note—List of exhibits pursuant to Rule 18, Sec. 2(f) will be found in Appendix of Plaintiff-Appellant.

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STATUTES.

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This brief relates solely to the appeal of Union Slide Fastener, Inc., hereinafter called "Union," from that portion of the judgment dismissing the counterclaim herein and from an order denying Union's motion for a new trial on the counterclaim. Union will file additional brief material in response to the cross appeal of Talon, Inc., hereinafter called "Talon," in accordance with the Rules of this Court.

Statement of Jurisdiction.

The plaintiff, Talon, brought this action on October 17, 1949, seeking to enforce an alleged claim for infringement of six of its patents by Union. In its answer, Union denied the validity of each patent as well as infringement by it and included a counterclaim against Talon alleging violation of the anti-trust laws.

Jurisdiction of the Court under the Patent laws of the United States is alleged in paragraph III of the complaint (Rec. 4) and is admitted in paragraph III of the amended answer (Rec. 24). Jurisdiction of the Court over the counterclaim is invoked by paragraph I of the counterclaim (Rec. 31, 32) under the Clayton Act, 15 U. S. C. 15, cited in the appendix p. 1a.

On November 24, 1952, on motion by Talon, the complaint was dismissed as to four of Talon's patents.

A trial was finally conducted before Judge James M. Carter in the United States District Court for the Southern District of California, Central Division from March 1, 1955 to March 15, 1955.

In a Memorandum to Counsel filed July 17, 1956 (Rec. 130-154) the District Court held Talon's two remaining patents, Poux, 2,078,017, and Silberman, 2,437,793, invalid and not infringed (Rec. 136-141). The Court further decided that Talon was estopped to assert infringement of these two patents (Rec. 140). The Court went on to find Talon guilty of unclean hands and misuse of its patents under the anti-trust laws (Rec. 141-152). The Court also decided that Union had failed to prove damages to itself and causal connection between damage to Union and the unlawful acts of Talon (Rec. 153). Union was permitted to amend its counterclaim to the extent that the anti-trust allegations were framed as an affirmative defense (Rec. 153).

Union moved on June 7, 1957 for a new trial on its counterclaim (Rec. 1615) which was denied by the Court (Rec. 1653).

From the final decision of the District Court dismissing Union's counterclaim and motion for a new trial, Union appeals under 28 U. S. C. 1291 (appendix, p. 1a).

Union's Statement of the Facts.

Prior to 1934, Talon had enjoyed a dominant position in the sale of slide fasteners or zippers throughout the world, a position sustained largely by its patents. By 1934, however, Talon's patent situation was rapidly deteriorating and Talon deemed it necessary to embark upon a program calculated to control the trade in zippers and to maintain its old monopoly.

This program, altered only slightly over twenty years, comprised three original phases:

1. The purchase of zipper manufacturing patents, irrespective of their merit, with which Talon hoped to cloak its monopoly with an aura of respectability (Finding of Fact XXXXIII, Rec. 186).
2. The making of bogus royalty and license agreements based upon these patents to divide the market in accordance with Talon's scheme of things (Findings of Fact XXXII, XXXIII, XXXIV, XXXV—Rec. 183, 4).
3. The commencement of baseless litigation upon worthless patents to the point of a consent decree before trial, the decree containing the desired royalty and license arrangements (Findings of Fact XXXXV, XXXXVII, Rec. 186, 7).

A fourth phase was introduced about 10 years ago:

4. The introduction of competitive products sold by Talon at less than cost, underselling such competitors as might survive the other parts of the program (Finding of Fact XXXI—Rec. 183).

The facts of Talon's plan are as clear as they are ugly; as the District Court was quick to perceive (Rec. 145, *et seq.*).

In 1934, Talon decided to allocate sales territories and to arrange quotas for its competitors. This was reflected in the so-called "American Agreement," defendant's Exhibit AH (Rec. 125). The "American Agreement," antedating the patents in suit, attempted to control prices and fix "quotas," i. e., to fix the percentage of the market that each of Talon's competitors were permitted to have. The District Court recognized the illegality of this arrangement (Rec. 146). Efforts such as those exemplified by the "American Agreement" were met with increasingly strict enforcement of the anti-trust laws and Talon, perforce, became increasingly more ingenious and subtle in its scheme to control the market.

On April 20, 1937, a patent to Poux, No. 2,078,017 was issued. The Poux patent, a slim reed dressed up by Talon in the guise of a club, was one of several patents purchased by Talon to cover its subsequent operations with apparent legality. The operations began with the disposition of Talon's larger competitors.

Armed with the Poux patent as a pretended sword of righteousness, Talon sued Conmar Manufacturing Co. on October 18, 1937. Conmar was Talon's biggest competitor, and as it developed, was prey indeed worthy of Talon's talents. Conmar had obtained a new "high speed" machine for making zipper chain, the teeth and tape which are the base of all zippers. New at least were such machines to Talon, who had been using "low speed" machines. It was true that the so-called "high speed" machine used by Conmar made a product of somewhat lesser quality than Talon's slower machine, but the threat of increased capacity offered by such machines was indeed potent.

Talon prudently saved its Poux patent for another day however, resolving its differences with Conmar by consent decree, a disposition often to occur in Talon cases. Conmar obtained a royalty-free license extending approximately *25 per cent of Talon's net sales of zippers during the previous year.* According to the license, if this "quota" were exceeded by Conmar, royalties became applicable which would make such increased production by Conmar unprofitable. The license agreement was quite indifferent to patents and indeed failed to recite which if any of Talon's patents were to be used by Conmar. In addition, Talon bolstered its own, weak patent position by obtaining licenses under Conmar's patents. It is interesting to note that the result of the Talon-Conmar agreement was and has been to maintain Conmar in second place in the industry. As a practical matter, the testimony shows that the royalty free quota fixed under the Talon-Conmar agreement was exceeded upon only one occasion and at that time waived by Talon, whose real interest was, of course, control of the market—not royalties.

It was while the Conmar suit was yet pending that Talon first devised the escalator royalty which was to be its handiest tool. In October of 1938 Talon exacted a royalty arrangement from the Joy Fastener Co., which first demonstrated this escalator royalty technique. Contrary to customary patent licensing practice which reduces royalty with increased manufacture, the Talon-Joy agreement, defendant's Exhibit X (Rec. 124), provided that Joy should pay to Talon a relatively small royalty (subsequently modified to no royalty) covering Joy's manufacture up to a given percentage of the national production of zippers. The evil intent of the agreement laid bare in an increasing royalty as Joy's manufacture increased beyond this point where Joy's manufacture would necessarily become unprofitable.

Having disposed of its biggest competitor, Talon waited out the war and in 1945, dominated the zipper field to the extent of 60 per cent of total zipper production. As Talon's witness Meech testified, "Competition started to come into the picture to a greater degree" (Rec. 605).

On May 22, 1945, a license agreement was made by Talon with Universal Fastener Corp., defendant's Exhibit AG (Rec. 125). Universal—today called Serval—was one of the leaders in the zipper business (Rec. 651), holding about fifth or sixth position (Rec. 651, 2). The Talon-Universal agreement is still in force (Rec. 649, 650) and provides for a minimum royalty-free quota based on 25 per cent of *Talon's* production, with a 5 per cent royalty payable for production over the quota. It is interesting to note that as in the case of Conmar, *royalties have never been paid by Serval.*

Having limited its larger competitiors, Talon turned to its lesser competitors, the first prey being Rex Slide Fastener, which took a license on June 1, 1945. The Talon-Rex agreement at first provided for a 1½ per cent royalty on zippers and 2½ per cent on chain, defendant's Exhibit AG (Rec. 125). This agreement which varied the usual escalator royalty theme was superseded by a second agreement of September 2, 1947, defendant's Exhibit AG-1 (Rec. 125), which incorporated Talon's tested formula for monopoly. The second Rex agreement provided for a royalty-free quota of 27,500,000 units, with a 5 per cent royalty payable for any excess production over the prescribed quota. Apparently, Rex had been able to increase production to the point considered dangerous by Talon.

On July 16, 1945, Talon entered its first agreement, plaintiff's Exhibit 7 (Rec. 120), with Cap-Tin and one Silberman, purported to be the inventor of one of the patents still in suit. This agreement provided for Talon's usual lofty gift of a royalty-free quota, with a massive 10 per cent penalty for production exceeding the quota. Silberman had some zipper patents of his own which Talon had considered obtaining to the extent of getting an option to purchase. Obviously, if Silberman had anything, he could not be allowed to run away with the market until Talon decided whether it was worthwhile to exercise its option. Talon did so exercise its option, despite a holding by Judge Woolsey that Silberman was an "industrial pirate" *Conmar Mfg. Co.* v. *Lamar Slide Fastener* (U. S. D. C.—S. D. N. Y.), Rec. 1032, and purchased the Silberman patent at a crucial time as we shall see.

The next license was granted by Talon to Strauss Fasteners, Inc., on August 9, 1945, defendant's Exhibit AD (Rec. 124). This license did not relate to either of the patents in suit, but it reveals Talon's efforts to restrict any competitor who might affect Talon's position; it contains a provision whereby Talon is licensed on patents owned by Strauss itself "insofar as those patents have any of the elements of Talon patents."

On October 26, 1946, came an agreement with Hared Fasteners, Co., defendant's Exhibit AF (Rec. 125). This agreement did not provide for a quota control but limited Hared to the use of ten machines subject to a 1½ per cent royalty on zippers and a 2½ royalty on parts. Hared was later purchased by Conmar.

On May 7, 1948, plaintiff granted a license to Marvel Fastener Co., including quota control, with an initial royalty-free quota of 15,000,000 units and a 5 per cent royalty for production in excess of prescribed quotas. *No royalties were ever paid by Marvel* (Rec. 656).

On November 21, 1949, Talon licensed Star Fastener Co., providing for an initial royalty-free quota of 30,000,000 units and a 3 per cent royalty on production in excess of that quota. No royalties have ever been paid under this agreement. Star was a special thorn in the Talon hide and required special consideration by Talon. Although the Talon-Star agreement was made after Talon had acquired the Silberman patent (2,437,793) which purportedly covered "high speed" machines, this patent was not licensed to Star. Talon's witnesses gave as the reason for this singular omission that Star did not require a license under the Silberman patent—"Star was the licensee of Conmar, and they were using a *Conmar* type machine" (Rec. 622). Apparently, Talon's principal concern was to prevent Star, the only other company operating high speed machines, from getting ahead of Talon in zipper production.

On May 10, 1950, a royalty-free license and cross-license agreement was entered into by Talon and Waldes Koh-I-Noor, defendant's Exhibit W (Rec. 124). Talon in its testimony was unable to explain why the Waldes required any license from it. Waldes used a different (Prentice) machine; (Rec. 684, 5) its principal business was hardware. Reflecting Talon's fear of users of high-speed machines, the license included the Poux patent but did not include the Silberman patent.

While negotiating this network of quota control licenses Talon tried litigating to death other concerns that refused to go along, defendant's Exhibit S (Rec. 123); no firm manufacturing zippers was too small to escape its attention. Even firms who were not manufacturing zippers were sued! Talon's blunderbuss was raised against Closurette Corporation of America in the United States District Court for the Southern District of New York, on the ubiquitous Poux patent. Closurette was a very small concern and as things worked out, was not even engaged in the manufacture of zippers, defendant's Exhibit AN (Rec. 126). In this debacle, Talon wound up paying Closurette's counsel fee.

Also in 1948, patent infringement suits were brought against Max Lange and Slidelock Corporation; another suit against the Carney Fastener Corporation. Both actions, happily for the Poux patent and its owner Talon, were terminated by consent decrees. It was all too much for Carney, however, who went out of business (Rec. 590).

In all its efforts, however, Talon had not overlooked Union and the threat of competition from the West Coast. On September 29, 1949, a meeting attended, *inter alia,* by a Union representative was held in the Los Angeles office of Talon. The story of this meeting must be pieced together from the depositions of Isidore Napp, defendant's Exhibit AL (Rec. 1465 *et seq.*), Robert Eisenberg, defendant's Exhibit AK (Rec. 1456 *et seq.*), and Messrs. Jager, defendant's Exhibit AI (Rec. 1430) and Detweiler, defendant's Exhibit AJ (Rec. 1444). The following facts clearly emerge.

The witnesses Jager and Detweiler agreed that the meeting had been arranged by one, Abramson, of Apparel Manufacturer's Supply Company, a Talon jobber. Oddly enough, Abramson was not present at the meeting.

Mr. Eisenberg testified that he believed that a representative of Conmar (Mr. Tarshes) had been invited. Conmar was not, however, represented at the meeting.

Mr. Detweiler "imagined" that Mr. Jager presided, (Rec. 1446) and stated the purpose of the meeting to be "to air complaints and call a spade a spade." He said Talon's jobbers were concerned because everyone was underselling Talon. Even Mr. Jager admitted the correctness of his answer to defendant's Interrogatory No. 83, that the purpose of the meeting was to discuss market conditions; and Mr. Napp recalled Mr. Eisenberg talking of the rumors about "Wilzip" (Rec. 1472, 3) a low-cost zipper which Talon was to introduce below cost to stifle competition.

Mr. Eisenberg, in his deposition (Rec. 1458, 9, 1460) testified that Mr. Jager presided; that Mr. Jager stated, in effect, that unless the West Coast manufacturers behaved, Talon would bring the Wilzip zipper into the market; and that Wilzip had raised havoc with small eastern manufacturers, many of whom had gone out of business because they could not meet the competition. Here was the naked, mailed fist, the threat to squeeze the "little fellows" if they persisted in close competition with Talon.

Mr. Eisenberg's testimony was corroborated by Mr. Detweiler (Rec. 1447, 9). He said there was a discussion about Wilzip zippers as a possibility for the future and that the remark had been made that the Wilzip zipper might be introduced in the Pacific Coast market.

The only reasonable conclusion that can be drawn from the testimony of these witnesses is that Talon, at the meeting of September 29, 1949, was pursuing the fourth phase of its plan to restrict competition and so the District Court found (Finding of Fact XXXI, Rec. 183).

It was in its individual pursuit of Union, that Talon made its masterpiece of irresponsibility. After some desultory correspondence between Talon and Union concerning an alleged infringement, one McKee, an employee of Talon, visited the plant of Union on or about April 18, 1948 and upon his return to the Talon Co. reported about his visit, plaintiff's Exhibit 14 (Rec. 120). This memorandum, although it described Union's operation in detail, was silent on the issue of infringement of Talon's patents.

If given the opportunity, Union could and would prove that:

1. McKee's visit provided Talon with information that made Silberman's machine practical.
2. That Talon appropriated the improvements to its own use, without Union's consent and without compensation. Significantly, the improvements appeared on Talon's exhibit 5 machine which Talon says purport to follow the Silberman patent.
3. After a delay of over three years, Talon suddenly developed an interest in Silberman's patent, and within 10 weeks of having visited Union's plant, acquired the Silberman patent.

4. Without any adequate investigation, Talon then proceeded to sue Union, *inter alia,* upon the Silberman patent.

This last point is most important, *the only inspection which Talon had ever made of the Union machines, prior to institution of this suit was the inspection of McKee, who, Talon's witnesses say, was not an engineer* (Rec. 513). As in the *Closurette* case, it evidences Talon's intention to employ litigation as a weapon to control the market without any determination as to whether or not there was actual infringement of any Talon patents. The plain fact is that at the time this suit was filed, Talon had no idea whether Union infringed any of Talon's patents or not; McKee was admittedly not qualified to make any judgment on technical matters, yet no other attempt was made by Talon to obtain information prior to the instituting of the law suit (Rec. 575). No drawings or models had ever been examined by an engineer who would be in a better position to determine whether there was an actual infringement; McKee's memorandum was silent in this regard.

The present litigation is nothing more than an extension of Talon's original plan applied to Union, revealed first by the American Agreement and followed without abatement after 1945 when "competition started to come into the picture to a greater degree" designed to arrest any competitive threat.

Specification of Error.

The District Court erred:

1. By concluding that Union was not damaged and that there was no showing of causal connection between Talon's acts and Union's injuries, resulting from what the Court itself found to be a continuing attempt by Talon to control competition in a substantial portion of the zipper industry in violation of the anti-trust laws.

2. By concluding that Talon's actions regarding Union were isolated acts rather than the concluding steps in the

final links in a chain of anti-trust violations extending over a period of twenty years and directed not only against the public in general but at Union in particular.

3. By failing to admit evidence or permit a new trial to show damage to Union flowing directly from Talon's efforts to control competition, comprising the acquisition by Talon of an invalid patent from a third party and the institution of an infringement suit against Union, in bad faith and without reasonable belief in the validity of Talon's patents; the introduction of a zipper sold below cost in Los Angeles, following a price control meeting in that city staged by Talon, and, under the pretext of examining Union's machines to determine possible infringement of which Talon had no knowledge, wrongfully appropriating improvements made by defendant.

In particular the Court erred in sustaining the objection of plaintiff's counsel as follows (Rec. 1128-1132):

> "Mr. Mockabee: Regarding Schedule II, your Honor, Mr. Lester Greene of the firm of Greer and Greene, certified public accountants, would, if called to the stand, testify that the items in Schedule II regarding estimated net profits that should have been earned is based upon a figure of 10 per cent of the invested and borrowed long-term capital and is a fair return on such investment. And he would also testify that from an inspection of the books of Union Slide Fastener, Inc., the profits and losses shown in Schedule II for the fiscal years ending February 28, 1950, through February 28, 1955, the last year being estimated because the books are not yet (1103) closed, are a true reflection of the profits and/or losses during that period.
>
> The Court: Is that what his testimony would be?
>
> Mr. Mockabee: He would further testify with regard to items on the books, which appear on the books, with regard to the other schedules, your Honor.
>
> The Court: Is that your offer of proof?
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> Mr. Mockabee: Yes, sir.
>
> Mr. Leonard Lyon: I object to the offer as incompetent, irrelevant and immaterial.

The Court: Of course, the general objection is good and it will be sustained. In addition, there is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action. Nor is the estimated earnings any more than a mere estimate based upon 10 per cent of invested capital, which doesn't take into account competition, the competitive conditions in the industry. This is a very competitive industry. We have heard testimony on that already. It doesn't include new devices coming out, new companies coming into the field, and such things as the introduction of the Wilzip zipper, or some other zipper that might come in by some other company.

Mr. Mockabee: Of course we maintain, your Honor, that the introduction of the Wilzip zipper was not normal competition, but was the consummation of a threat to do what plaintiff had (1104) done back East, and that is wrecked small companies through the introduction of a cut-price zipper, if defendants and others on the West Coast did not maintain prices.

The Court: All right. The objection to the offer of proof is sustained. You may step down, Mr. Witness."

*   *   *   *   *   *

"Mr. Mockabee: May I have an opportunity to present some law on the question of some of these matters in these schedules which have been objected to and the objection sustained?

The Court: No, I am not going to permit you to do that. I have taken some proof on attorney's fees and expenses, and time. These other matters are pure speculation. It is highly speculative. From the facts of this case I can't see how loss would be sustained by defendant by virtue of quota agreements entered with other manufacturers . . ."

ARGUMENT.

1.

Talon's illegal acts were directed at Union and Union is entitled to show its resulting damage.

Union concedes that a showing of injury to the claimant in a civil suit for treble damages under the anti-trust laws is essential to sustain the claim; evidence of injury to the public only is certainly not sufficient. It is also conceded that there must be causal connection between the alleged anti-trust violation and injury to the claimant. But, Union argues, it is the *ultimate result against the claimant*—rather than the effect of the individual parts of the wrong-doer's plan—which must be considered; the unity of the plan embraces all the parts.

As aptly stated in *Greenleaf* v. *Brunswick-Balke Collender Co.*, (D. C. Pa.) 79 F. Supp. 364-5:

> "Once it became apparent, as in the case before us, that the particular act or acts complained of as causing the injury are connected with or part of an unlawful plan to monopolize, the court will not segregate them to determine if they had gone beyond the bounds of legality; it will view the defendant's acts as a whole, for the parts take on the coloring of the general plan or scheme. *Swift & Co.* v. *United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 28 S. Ct. 572, 52 L. Ed. 865; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 51 S. Ct. 421, 75 L. Ed. 926; *Marienelli* v. *United States*, D. C. N. Y. 227 F. 165."

Firstly, it is Union's position that the present suit by Talon is an overt act employed by Talon against Union, that the suit was a detestible abuse of the courts and that the suit and its ramifications have resulted in great damage to Union which they are entitled to prove and recover. The use of meritless patent suits to obtain an illusory "licensing" agreement, or to wear the defendant out, are old tricks of Talon and have been used repeatedly by them in exercise of their scheme.

Secondly, Union asserts that the illegal use of a competitive product such as the Wilzip and the present day Falcon zipper made by Talon (Rec. 918) where such a competitive product is sold at less than cost in order to suppress competition were acts directed both against the public and Union; Union should be allowed to show the extent of its damages flowing from such acts.

a. Talon's baseless litigation is part of its illegal plan, is directed against Union and Union is damaged thereby.

Talon's use of baseless litigation to intimidate and overwhelm a competitor presents a situation that has been judicially considered.

Thus, in the case of *Kobe* v. *Dempsey Pump Co., et al,* 198 F. 2nd 416 (CA, 10-1952); certiorari denied, 344 U. S. 837, the origins of a plan to corner the oil well hydraulic pump market, comprising a patent pooling arrangement, admittedly had no direct effect on the claimant Dempsey. When, however, in implementation of the original plan, Kobe sued Dempsey without concrete information that Dempsey's pumps actually infringed Kobe's patents, the court held without hesitation that the suit was part of the plan and had injured Dempsey; Dempsey was adjudged entitled to treble damages. The court's statement is eminently in point:

> "Kobe strenuously contends that even though it may be guilty of monopolistic practices such practices did not reach the defendants until the commencement of the infringement action, and any damages suffered by them resulted only from that action. It is said that to allow recovery of damages resulting from the infringement action would be a denial of free access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. *At the same time we must not permit the courts to be a vehicle*

> *for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.*"*
>
> * * * * * *
>
> "The infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme."

It is clear then that Talon's reckless legal action was a pertinent facet of its anti-trust scheme and was certainly directed against Union. Union should not be prevented from proffering evidence to establish facts from which illegal monopolies may be inferred—although such acts by themselves would not be illegal.

In *Swift & Co.* v. *United States*, 196 U. S. 375, (1905) citing *Aiken* v. *Wisc.*, 195 U. S. 194, 206, (1904) Mr. Justice Holmes said:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

The District Court apparently gained the erroneous impression that each step of Talon's plan to restrain competition must somehow have resulted in injury to the claimant.

The following colloquy took place between Union's counsel and the Court. (Rec. 1131-1132):

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*Emphasis where added is ours, unless stated to the contrary.

> "Mr. Mockabee: May I have an opportunity to present some law on the question of some of these matters in these schedules which have been objected to and the objection sustained?
>
> The Court: No, I am not going to permit you to do that. I have taken some proof on attorneys' fees and expenses, and time. These other matters are pure speculation. It is highly speculative. *From the facts of this case I can't see how loss would be sustained by defendant by virtue of quota agreements entered with other manufacturers.*
>
> This man never was subject to a quota agreement."

Union urges that this faulty impression led the District Court to commit error in refusing to accept proof of damages caused by Talon's groundless suit against Union in furtherance of its plan. The plan, as in the case of many unlawful schemes, employed several phases, but had a common goal. In one phase Talon relied on restrictive agreements; in another on law suits never brought to trial to force acceptance of restrictive agreements; and, finally, on a carefully staged suit which Talon manufactured because Union refused to yield to the thinly veiled threat of the Los Angeles price control meeting.

Surely, until Union was singled out and attacked by Talon's vindictive litigation it would have been difficult, if not impossible for Union to prove that each preceding step in the plan had injured it any more than other manufacturers. Just as surely, however, Union's rights at the time Talon's scheme became specifically directed against it, were not diminished by the fact that the plot was conceived against the public as a whole.

The District Court's own findings reflect the relationship of Talon's acts to Union damage. Thus the Court found:

> That plaintiff's conduct is convincing that it (Talon) considered the validity of the two patents in suit relied on by plaintiff as being questionable and had not heretofore permitted their adjudication. (Finding XLIII, Rec. 186);

That his motion was brought in bad faith by plaintiff, and without reasonable belief in the validity of the patents, and this litigation proves harassment and misconduct on plaintiff's part (Finding XLV, Rec. 186);

The conference in Los Angeles between plaintiff and local zipper manufacturers in that city in 1949 was held in an attempt to maintain price control and evidenced an intent to misuse plaintiff's patents and to violate the anti-trust laws, and plaintiff introduced a cheap zipper in the Los Angeles area (Finding XXXI, Rec. 183);

That, under a pretext of ascertaining infringement, plaintiff was allowed to examine Union's machinery and appropriated, without compensation, defendant's improvements (Finding XLVI, Rec. 187);

That the improvements on Union's machines observed by McKee (plaintiff's Vice-President) caused Talon to buy Silberman '793 (Finding XV, Rec. 179, 180);

That Silberman '793 and the claims in issue, and the accused machine are not the same (Finding XIII, Rec. 178);

That Talon failed to show that a machine of the claims in issue of Silberman '793 ever operated (Finding XX, Rec. 181);

That Poux '0;7 was invalid (Findings VI to X, Rec. 173 to 176); and

That Silberman '793 was invalid (Findings XI to XVII, Rec. 177 to 180).

Union does not claim direct damage by reason of Talon's quota control agreements or by dealings between Talon and its competitors. Union does claim, however, Talon's lawsuit and the situations that arose in connection with it, were part of its plan to control the industry and that the very findings of the District Court show that Talon's litigation and its related acts to be part of a continuing plan to restrain competition and to enmesh and destroy its weaker competitors.

The institution of this suit without any real determination of infringement, the acquisition by Talon of Silberman '793, the misappropriation of Union's improvements, and the Los Angeles price control meeting followed by the marketing by plaintiff of a cheap zipper, all show a purposeful extension of the same unlawful plan, applying the brunt of the plan directly to Union and very nearly accomplishing its object: the destruction of Union.

The District Court's error deprived Union of a crucial right to show damage by the institution of the suit, by the acts preceding it, and by the conduct of Talon before, during and after the suit.

On the motion for a new trial on the counterclaim, Union attempted to point out the District Court's error, and detailed the proof of damages it felt entitled to offer (Rec. 1618-1622). Whether or not the proof offered would have satisfied the District Court is not important. The point is that Union was entitled to the opportunity to present its evidence. Surely, if the proof showed that before Talon concentrated its harassment of competitors on Union, Union had sold machines and thereafter could sell no more because of the suit (Rec. 1624-1625), there was clear and ascertainable damage resulting from the suit which was the last step in imposing Talon's illegal plan on Union in particular.

The District Court's ruling, in effect, holds a proven violator of the Anti-Trust laws immune to a claim for damages by a victim, provided the victimizing is accomplished, *inter alia*, by means of a law suit, regardless of its merit or motivation.

In summary, the proof here is adequate that the present litigation was brought, not to establish a right, but as the end product of a plan to restrain competition which the District Court found to be unlawful. Upon a suit brought in bad faith and without a reasonable belief in the validity of the patents (Rec. 186), and Talon can find little support for any proposition that the courts may be used freely as vehicles to implement an unlawful plan to restrain competition.

b. Talon's sales at less than cost to eliminate competition are directed at Union and Union is damaged thereby.

The sales of products below cost to eliminate competition have been condemned since 1911, *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 and are still held to be unlawful, *U. S.* v. *New York Great Atlantic and Pacific Co.*, 67 F. Supp. 626, affd. 173 F. 2d 79 (CA 7).

Talon's position is in the classic tradition of monopoly. Where there is evidence of a conspiracy in restraint of trade, the sale of goods below the point of fair profit or cost of production renders the wrongdoer liable to his competitors for treble damages. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931).

The *Story* case has been followed consistently and is the basis for the ruling in *Package Closure Corporation* v. *Sealright Co.*, 141 F. 2d 972 (CA-2, 1944). In the *Package* case a valid cause of action for treble damages was said to be alleged where it was stated that the wrongdoer conspired to drive the claimant out of business by fixing prices of bottle caps, etc. at prices below necessary to realize a reasonable profit and that as a result the claimant was compelled to close its business. Proximate cause is not a particular required allegation, the Court said, notwithstanding its jurisdictional nature.

Even injunction is a suitable remedy where ruinous competition and lowered prices are employed to eliminate weaker competitors. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (CA-2, 1929).

Surely such acts, which the District Court has found to exist, are acts against Union, for which Union is entitled to enter its proof and to obtain redress.

2.

Union's damage was held speculative after Union's evidence regarding damages had been excluded.

The District Court, after rejecting proof of damages at the trial by defendant (Rec. 1131-1132), remarked that damages were speculative and uncertain (Rec. 1132).

Obviously, if the District Court was in error in rejecting such proof, it could not, on the basis of the incomplete evidence accepted, properly say that the damages were speculative. Until all proof of damages had been submitted, there would be no basis for any ruling as to damages.

On Union's motion for a new trial on its counterclaim, Lipson's affidavit showed the following:

> a. That before this action was commenced, Union had sold high-speed zipper machines for a profit and had constructed additional machines for sale; and that after the action was begun no more machines could be sold, although eight were on hand ready for sale.
>
> b. That, before the action, Union had a competitive advantage which was lost when Talon misappropriated elements designed by Union to eliminate defects in high-speed zipper machines, and that such misappropriation was intimately related to the suit brought by Talon against Union because Talon had fraudulently attempted to pass off the misappropriated elements as part of the device of Talon's Silberman patent.
>
> c. That the action brought by Talon against Union adversely affected Union's credit rating. This is evident from the fact that one of the principal reasons for the cancellation of the R. F. C. loan was the pendency of the suit (Rec. 1634).

Further Union offered to show not only the facts of its near bankruptcy as a result of Talon's acts, but of its loss in profits for the various fiscal years (Rec. 1128-1135). The exclusion of such important evidence gives little basis for ruling that what evidence lay before the court was "speculative."

If the District Court had allowed proof of these matters to be placed in the record, a ruling that Union's damages were speculative would have been contrary to the evidence. The loss alone of profits on sales of machines constructed by Union and goods prior to the suit would have been easily subject to calculation.

3.

Proof of exact damage is unnecessary where the damage results from the wrongdoer's acts.

We have said before that the wrongful acts of Talon found by the District Court to be in violation of the anti-trust laws, culminated in the suit against Union and the introduction of the Wilzip zipper and that the suit was connected to the antecedent wrongs of Talon as part of a continuing plan to restrain competition.

It has also been said that the evidence in the record, together with the evidence rejected, tends to show the fact of damage to Union which could have resulted from the lawsuit, and which Union indeed contends did result therefrom.

In these circumstances it is Union's position that any uncertainty as to the damages must be borne by the wrongdoer, in this case, Talon; and that the wrongdoer cannot profit by its wrongdoing by asserting that other factors might have contributed to the victim's losses. As stated by Mr. Justice Stone in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946)—

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

The court then referred to the cases of *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931) and *Eastman*

Kodak Co. v. *Southern Photo Co.*, 273 U. S. 359 (1927) both of which were actions to recover treble damages for violations of the anti-trust laws, and both of which involved damages difficult to prove with any degree of certainty. At Pages 264 and 265, the Court said

> "The tortious acts had in each case precluded ascertainment of the damages more precisely * * *. Nevertheless, we held that the jury could return a verdict for plaintiffs * * *.
>
> "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. *But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.* In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof' (citing the *Story* and *Eastman* cases). *Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.* It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. *Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.*"

The Court then quoted, with approval, the following language in *Story Parchment Co.* v. *Paterson Co.* (*supra*):

> "*The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.* * * * That principle is an ancient one * * * and is not restricted to proof of damages in anti-trust suits, although their character is such as frequently to call for its application."

The identical principles have been recognized and applied in the State and Federal Courts in California. *Learned* v. *Castle*, 78 Cal. 454 at 461 (1889); *Hanlon Drydock* v. *Southern Pacific*, 92 Cal. App. 230 (1928); and *Permanents Metals Corp.* v. *Pista*, 154 F. 2nd 568 (C. C. A. 9th).

Conclusion.

For all the foregoing reasons this Court should reverse that portion of the Judgment dismissing the counterclaim for affirmative relief in favor of defendant and against plaintiff, and should direct a new trial on the counterclaim.

Respectfully submitted,

Alan D. Mockabee,
Attorney for Appellant-Union Slide Fastener, Inc.,
108 West 6th Street,
Los Angeles, Cal.

Delavan Smith,
Edwin S. Shapiro,
Smith & Auslander,
160 Broadway,
New York, N. Y.,

William J. Graham,
12 E. 41 Street,
New York, N. Y.,
of Counsel.

APPENDIX.

Statutes Regarding Jurisdiction.

15 USC Sec. 15:

Suits by persons injured—Recovery of triple damages. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)

28 USC Sec. 1291:

Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 929.)

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